BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

RAY A. BERMUDEZ	)	
Claimant	)	
V.	)	
	)	
CHAVEZ RESTORATION	)	Docket No. 1,069,304
Respondent	)	
AND	)	
	)	
FARM BUREAU MUTUAL INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent and insurance carrier (respondent), by and through Matthew Crowley, of Topeka, request review of Administrative Law Judge Rebecca Sanders' November 14 2014 preliminary hearing Order. Jeff Cooper, of Topeka, appeared for claimant.

The record on appeal is the same as that considered by the judge and consists of the October 7, 2014 preliminary hearing transcript and exhibits thereto, in addition to all pleadings contained in the administrative file.

ISSUES

The judge designated Harold Hess, M.D., as the authorized treating physician to provide medical treatment for claimant's January 22, 2014 accidental injury.

Respondent requests the Order be reversed, arguing the judge exceeded her authority in ordering an authorized treating physician. Respondent asserts the issue of an authorized treating physician was not in controversy or ripe for determination. In addition, respondent contends the lack of notice of the issue at preliminary hearing violated their due process rights. Claimant requests the appeal be dismissed, arguing the Board lacks jurisdiction.

The issues for the Board's review are:

1. Did the judge exceed her authority in designating Harold Hess, M.D., as the authorized treating physician?

2. Were respondent's due process rights violated?

FINDINGS OF FACT

Claimant worked as a crew leader for respondent for almost 20 years. His job required him to move furniture and operate machines to clean fire and flood damaged walls and ceilings. He worked on carpeting and duct work, in addition to removing drywall.

Claimant has a history of back problems. In 1994, he had a work-related low back injury while working for respondent. He testified he made a full recovery after chiropractic treatment. In 2001, he had a low back injury, sought chiropractic treatment, settled the claim for a 10% whole person impairment, and returned to his former job duties. In 2008, claimant had low back pain for which he had three months of chiropractic treatment before returning to regular duties. In 2009, he had low back pain after moving furniture, but did not seek treatment. Claimant testified he was not under any restrictions prior to his accident on January 22, 2014.

On January 22, 2014, claimant was cleaning vents when he had severe pain in his back and down his left leg. Claimant indicated the pain was more severe than anything he had felt before. In describing the accident, claimant testified:

> We were on a duct job. My job is to go and remove all the vents, take them down and [c]lean them, put them back up. His job is to work on the motor. And I was - - how I got hurt, I was going up a ladder higher than usual, this was a higher ceiling. And I was attempting to take the vent down. And I went to reach for it, and that's when I felt the pain down my back and my leg.[1]

Shortly thereafter, claimant reported the incident to his supervisor, Steve Ortega, who told him to take the rest of the day off. Claimant was unable to work the following day. According to claimant, Mr. Ortega did not direct him to get medical treatment.

On January 24, 2014, claimant went to his chiropractor, Lance Malmstrom, D.C., who took claimant off work from January 24, 2014 through February 28, 2014. Claimant attempted to return to work, but was laid off by respondent. He stated, "Chavez told me that workman's comp said that they didn't want me to work there no more. They had to get rid of me."[2] Claimant applied for and received unemployment benefits. Claimant continued to treat with Dr. Malmstrom until March 14, 2014.

On May 13, 2014, claimant saw Pedro Murati, M.D., at his attorney's request. Claimant complained of low back pain with radiation down his left leg. Dr. Murati diagnosed claimant with low back pain with signs of radiculopathy, as well as left SI joint dysfunction. Dr. Murati noted claimant had a prior low back injury and a settlement.

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[1] P.H. Trans. at 8-9.

[2] P.H. Trans. at 12.

Dr. Murati opined claimant's work-related accident caused him to have low back pain and was the prevailing factor in the development of his current conditions.

Dr. Murati imposed temporary restrictions that basically consisted of light duty. Dr. Murati recommended an MRI of the lumbar spine, bilateral lower extremity NCS/EMG, physical therapy, anti-inflammatory medication, pain medication, lumbar epidural steroid injections, cortisone injections and possible surgical evaluation.

On June 10, 2014, claimant's attorney faxed a seven-day demand to respondent's counsel. Among other demands, claimant requested the medical treatment recommended by Dr. Murati.

On August 6, 2014, claimant saw Chris Fevurly, M.D., at respondent's attorney's request, for an independent medical evaluation. Claimant complained of very little low back pain at rest, but reported pain in the back and left lower buttocks with activity. Claimant indicated his leg symptoms are occasional, lasting for seconds to minutes at a time with occasional numbness and tingling. Dr. Fevurly diagnosed claimant with chronic regional back pain with nonspecific left lower extremity complaints and no current physical examination findings for left leg radiculopathy.

Dr. Fevurly recommended physical therapy and possible chiropractic treatment and indicated claimant could return to his former duties. However, Dr. Fevurly noted claimant had a preexisting low back condition dating back to 1994 and the prevailing factor in his injury was such preexisting condition.

A preliminary hearing was held on October 7, 2014. Claimant complained of continued back and leg pain. He testified he has difficulty with housework and laundry, in addition to walking or sitting for long periods of time.

Following the preliminary hearing, the judge ordered an independent medical evaluation with Harold Hess, M.D. Such physician evaluated claimant on October 31, 2014. Dr. Hess was aware of claimant's preexisting low back injuries, but he opined claimant likely sustained a new injury – an annular tear – and claimant's accident was the prevailing factor in causing his current symptoms and need for medical treatment.

The judge sent counsel a November 3, 2014 letter asking for any comments they might have concerning Dr. Hess' report. In a November 6 letter, claimant's counsel asked the judge to authorize Dr. Hess' suggested treatment. Respondent's counsel responded to the judge in a November 7 letter and advised it would be authorizing medical treatment consistent with Dr. Hess' recommendations. By way of a November 14, 2014 Order, the judge designated Dr. Hess as the authorized treating physician to provide claimant with medical treatment.

PRINCIPLES OF LAW

K.S.A. 2013 Supp. 44-510h states, in part:

(a) It shall be the duty of the employer to provide the services of a health care provider . . . as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

(b)(1) If . . . the services of the health care provider . . . are not satisfactory, the director may authorize . . . some other health care provider. . . . [T]he employer shall submit the names of two health care providers who . . . are not associated in practice together. The injured employee may select one from the list who shall be the authorized treating health care provider.

K.S.A. 2013 Supp. 44-510j(h) states, in part:

If the employer has knowledge of the injury and refuses or neglects to reasonably provide the services of a health care provider required by this act, the employee may provide the same for such employee, and the employer shall be liable for such expenses subject to the regulations adopted by the director.

K.S.A. 2013 Supp. 44-534a(a)(2) states, in part:

Upon a preliminary finding that the injury to the employee is compensable . . . , the administrative law judge may make a preliminary award of medical compensation . . . to be in effect pending the conclusion of a full hearing on the claim, except . . . no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accident, repetitive trauma or resulting injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. Such review by the board shall not be subject to judicial review. . . . Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

K.S.A. 2013 Supp. 44-551(l)(2)(A) states, in part:

If an administrative law judge has entered a preliminary award under K.S.A. 44-534a, and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

ANALYSIS

1. The judge did not exceed her authority in designating Harold Hess, M.D., as claimant's authorized treating physician.

K.S.A. 2013 Supp. 44-534a(a)(2) grants a judge jurisdiction to decide issues concerning payment of medical compensation. "Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly."[3]

Not every alleged error in law or fact is subject to review. On an appeal from a preliminary hearing Order, the Board can review only allegations that the judge exceeded his or her jurisdiction under K.S.A. 2013 Supp. 44-551 and issues listed in K.S.A. 2013 Supp. 44-534a(a)(2) as jurisdictional issues, which are: (1) did the worker sustain an accident, repetitive trauma or resulting injury; (2) did the injury arise out of and in the course of employment; (3) did the worker provide timely notice; and (4) do certain other defenses apply. "Certain defenses" refer to defenses which dispute the compensability of the injury.[4]

Respondent alleges the judge exceeded her jurisdiction in authorizing Dr. Hess to be claimant's authorized treating physician. This is not a jurisdictional issue subject to review on an appeal from a preliminary hearing Order.[5] Whether the judge must authorize treatment from a list of two physicians designated by respondent is not a question which goes to the jurisdiction of the judge.

Judges routinely order medical treatment to satisfy the Act's goal of curing and relieving the effects of a worker's injury.[6] The judge did not exceed her jurisdiction by designating Dr. Hess as the court-ordered treating physician. As contemplated by K.S.A. 2013 Supp. 44-534a, the judge determined an issue regarding the furnishing of medical treatment, which was within her jurisdiction. Because the Board does not have preliminary jurisdiction to review the judge's ruling regarding medical treatment, this appeal should be dismissed.

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[3] *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

[4] See *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

[5] *Mendoza v. Promise Regional Medical Center*, No. 1,059,028, 2012 WL 2061785 (Kan. WCAB May 18, 2012); *Wheeler v. HBD Industries, Inc.*, No. 1,054,924, 2011 WL 5341323 (Kan. WCAB Oct. 27, 2011); *Beck v. U.S.D. 475,* No. 1,039,614, 2010 WL 2242752 (Kan. WCAB May 25, 2010); *Spears v. Penmac Personnel Services, Inc.*, No. 1,021,857, 2005 WL 2519628 (Kan. WCAB Sept. 30, 2005); *Briceno v. Wichita Inn West*, No. 211,226, 1997 WL 107613 (Kan. WCAB Feb. 27, 1997).

[6] K.S.A. 2013 Supp. 44-510h(a).

2. Respondent's due process rights were not violated.

Respondent argues its due process rights were violated because it had no advance notice claimant was seeking designation of an authorized doctor. In an associated argument, respondent contends because claimant was not seeking a change in physician, the judge's appointment of Dr. Hess was a prohibited determination of an unripe issue.

Claimant was seeking medical treatment which would require a physician. Respondent was not providing medical treatment. Dr. Fevurly only performed an IME and he opined claimant's accident was not the prevailing factor in causing claimant's injury, which is tantamount to a denial of medical treatment. Claimant need not ask for a change of physician when respondent is not providing medical treatment. The issue of medical treatment was squarely before the judge and her ruling was within her authority.

CONCLUSIONS

The judge did not exceed her jurisdictional authority. Respondent's due process rights were not violated. The Board does not have jurisdiction to hear respondent's appeal.

WHEREFORE, the appeal of the Order is dismissed.[7]

IT IS SO ORDERED.

Dated this _____ day of December, 2014.

_____
HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

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Honorable Rebecca Sanders

[7] By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim. Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.